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IN THE

Supreme Court of the United States

October Term, 1979

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA,
AND GEORGIA-PACIFIC CORPORATION,
Petitioners

v.

ADAMS EXTRACT COMPANY, ET AL,
Respondents

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR PETITIONER PACKAGING CORPORATION OF AMERICA

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OPINIONS BELOW

The opinion of the Court of Appeals is not reported and appears in the Joint Appendix ("J.A.") at page 277. The opinion of the United States District Court for the Southern District of Texas is reported at 84 F.R.D. 40 and appears in the J.A. at page 259.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 30, 1979. The petition for a writ of certiorari was filed on December 21, 1979, and the Writ of Certiorari was granted on June 16, 1980. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

(1) 15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dolars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(2) 15 U.S.C. § 15. Suits by persons injured; amount of recovery

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and

the cost of suit, including a reasonable attorney's fee.[1]

STATEMENT OF THE CASE

Packaging Corporation of America ("PCA") adopts the Statement of Case made in the Brief for Petitioner, Westvaco Corporation ("Westvaco"), other than the commentary therein concerning the fact of Westvaco's notice to other Defendants of its intention to assert rights of contribution. Except as necessary to distinguish the position of PCA in this case, no further statement will be made.

This case results from a denial by the District Court of motions by Petitioners, Westvaco, Georgia-Pacific Corporation and PCA, for leave to assert cross-claims for contribution against other Defendants who had previously settled. These motions were denied by Pretrial Order No. 13, dated May 30, 1979, and appeals were taken. On October 30, 1979, the United States Court of Appeals for the Fifth Circuit affirmed that order.

On December 20, 1979, Petitioners filed a joint petition for a writ of certiorari which was granted. Prior to the issuance of the Writ of Certiorari and as trial in the District Court became imminent, PCA entered into a settlement agreement, dated March 20, 1980, providing for settlement of the class action against it for an eight million dollar ($8,000,000.00) cash payment. By pretrial

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1. The issue of contribution is not directly or indirectly mentioned or referred to in these provisions and there is no other statutory provision governing or alluding to this question. A review of the legislative history of the federal antitrust laws has led one commentator to conclude that "Congress probably did not consider the contribution issue". *See* Note, ***Contribution Among Antitrust Defendants***, 33 VAND.L.REV. 979, 996 (1980).

Order No. 50, dated May 6, 1980, PCA's settlement agreement was preliminarily approved by the District Court, and PCA, together with certain other Defendants who had settled, was excused from further trial participation. Appendix A. Thereafter, a motion for severance by PCA was granted by Pretrial Order No. 52, dated May 20, 1980. Appendix B.

Until the expected final approval of its settlement occurs, PCA continues to be a Defendant that has not settled.

SUMMARY OF ARGUMENT

Fundamental fairness requires that the principle of contribution be applicable in federal antitrust cases. A rule barring contribution among multiple alleged violators in such actions inequitably saddles an individual defendant not only with damages for his own conduct but also for that of others whom the plaintiff fails to sue or with whom the plaintiff settles.

Claim reduction is recognized as the proper method of applying contribution in cases where some defendants have settled. Claim reduction does not expose a settling defendant to additional liability and would permit settlements in federal antitrust cases to be final.

ARGUMENT

I. Contribution is Necessary to Promote Fairness and Prevent Coercion.

Contribution is an equitable principle arising from the proposition that those jointly responsible for harm should fairly share the burden of resulting liability. Even in the

absence of express statutory authority, federal courts have applied the principle of contribution in a variety of contexts. Westvaco's Brief persuasively argues that a bar to contribution in federal antitrust cases is unfair and permits defendants to be unreasonably coerced into settlements. PCA concurs in that portion of Westvaco's argument.

PCA's experience in this litigation vividly illustrates that a rule barring contribution is unfair. As this case progressed, PCA was compelled to continuously reassess its position, not with respect to the merits of its defenses, but in light of the burgeoning consequences of failure. As each succeeding settlement shifted potential liability arising out of the settler's conduct to the remaining Defendants, PCA's exposure to the Plaintiff's multi-billion dollar claims expanded. Eventually, after the population of non-settling Defendants had become substantially diminished, the consequences of failure became so overwhelming that they ceased to bear any rational relationship to even the Plaintiff's allegations as to PCA's conduct. PCA, confronted with gambling the company in litigation, chose to settle.

II. Claim Reduction is a Proper Method of Applying Contribution.

Claim reduction requires that in computing any damages assessed against a defendant, the amount of damages attributable to the conduct of a settling or unnamed defendant be excluded. Federal courts have recognized that claim reduction is a proper method of applying the principle of contribution. Research has failed to disclose any federal decision holding that claim reduction is not a proper method of applying contribution.

In *Martello v. Hawley,* 300 F.2d 721, 724 (D.C. Cir. 1962), a negligence case, the Court held that contribution was required to prevent collusion and to insure fairness and ruled that if the settling defendant was ascertained to be negligent, then the non-settling defendant would be required to pay only its allocated portion of the total verdict. The principle of *Martello*[2] was followed in *Gomes v. Brodhurst,* 394 F.2d 465, 467 (3rd Cir. 1968).[3] In that case, plaintiff brought a negligence action against two defendants, one of whom settled prior to trial. The issue presented to the Third Circuit was " . . . should the judgment against appellant be reduced to reflect any right of contribution he might have." *Id.* Responding in the affirmative, the Court held that the amount of any judgment should not include any damages attributable to the conduct of the settling defendant. Similarly, in *Murray v. United States,* 405 F.2d 1361 (D.C. Cir. 1968), and *Dawson v. Contractors Transport Corp.,* 467 F.2d 727 (D.C. Cir. 1972) and *Doyle v. United States,* 441 F. Supp. 701 (D.S.C. 1977), contribution was applied by means of claim reduction.

State courts have also recognized the relationship between claim reduction and the principle of contribution. In *Judson v. Peoples Bank & Trust Co.,* 17 N.J. 67, 110 A.2d 24 (1954), the Supreme Court of New Jersey, presented with a state contribution statute which contained no specific provision for applying contribution when one or more defendants had settled, held that claim reduction " . . . is a logical incident of the created right of contribution. . . ." 17 N.J. at 93, 110 A.2d at 37.

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2. The holding in *Martello* was reaffirmed in *Brightheart v. McKay,* 420 F.2d 242 (D.C. Cir. 1969).

3. The holding in *Gomes* was reaffirmed in *De Laval Turbine Inc. v. West India Indus., Inc.,* 502 F.2d 259, 270 (3rd Cir. 1974).

III. Claim Reduction Does Not Discourage Settlements.

It has been asserted that a rule permitting contribution in federal antitrust cases would discourage settlements. Where there have been some settlements in a case, the application of the principle of contribution by means of claim reduction would preclude any subsequent action for contribution against a settling defendant and, thus, would preserve the element of finality that is a requisite for settlement.

A recent law review article not only supports the applicability of contribution in federal antitrust cases, but reasons that where settlements have occurred, implementation should be by means of claim reduction. Note, *Contribution in Private Antitrust Actions,* 93 HARV. L. REV. 1540 (1980). After evaluating various methods of computing contribution share, the author concludes by stating that:

> . . . a court should decrease damage awards according to the method by which it would have computed a settlor's contribution share. If contribution would have been pro rata, deductions should be pro rata; if contribution would have reflected the economic benefits accruing to a defendant, that defendant's conduct should not be considered in the computation of damages. Settling defendants should not be liable for contribution. This approach makes the incentive of any defendant to settle independent of the settlement desires of other defendants. Nonsettlors would not face liability for settlor's damages. By avoiding judicial determination of a settlor's liability, this system would avoid undermining the parties' incentives to settle. *Id.* at 1560-61.

Moreover, in *Judson v. Peoples Bank & Trust Co., supra,* the Supreme Court of New Jersey found claim reduction to be the "clearly preferable" solution to the problem of applying contribution with respect to settlements. Mr. Justice Brennan, then a Justice of the Supreme Court of New Jersey, reasoned that:

> [t]he problem is to blend the themes of compromise and contribution, maintaining the essential integrity of each as far as possible. . . . Collusive settlements are wholly ineffective when a credit of the settler's pro rata share is the required result of any settlement, and this helps attain one of the objectives . . . of contribution. . . . And, thereby the settling tortfeasor is assured of the finality of his settlement, and impairment of the public policy favoring compromise is avoided. The injured party should not be discouraged from settlement by such a rule. He cannot complain of unfairness, since . . . the reduction would be a direct result of his own act in accepting less than [the settler's pro rata share of] the total recoverable damages in settlement with the compromising wrongdoer. 17 N.J. at 92-93, 110 A. 2d at 36-37 (citations omitted).

CONCLUSION

Petitioner PCA therefore respectfully requests this Court to reverse the judgments of both the District Court and the Court of Appeals for the Fifth Circuit and to declare and hold that the principle of contribution is applicable to federal antitrust cases and that any liability adjudged against any non-settling defendant be reduced prior to trebling by claim reduction based upon an appropriate method and for such other and further relief as the court may deem proper.

We therefore submit that claim reduction is proper here.

Dated: August 26, 1980

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310

(ALL CLASS CASES)

IN RE CORRUGATED CONTAINER

ANTITRUST LITIGATION

PRETRIAL ORDER 50

The court having held a conference in this litigation on May 2, 1980, now enters the folowing order:

1. The proposed settlements between both plaintiff subclasses and defendants Packaging Corporation of America, Fibreboard Corporation, Potlatch Corporation, and Georgia-Pacific Corporation appear to be fair, adequate, reasonable, and negotiated in good faith and they are hereby preliminarily approved. It is understood that these four settling defendants shall not appear at or participate in the forthcoming trial with non-settling defendants; and neither the plaintiffs, with respect to these settling defendants, nor these settling defendants will be bound by the outcome of that trial.

* * *

DONE this 6th day of May, 1980, in Houston, Texas.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

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APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310

(ALL CLASS CASES)

IN RE CORRUGATED CONTAINER

ANTITRUST LITIGATION

PRETRIAL ORDER 52

The court having held conferences in this litigation on May 22, 23, 26, and 27, and having studied the numerous motions pending, enters the following order:

* * *

3. The motions of Crown-Zellerbach, Packaging Corporation of America, Georgia-Pacific, Fibreboard Corporation, Potlatch Corporation, and the Fibre Box Association for severance are GRANTED. Any trial of these six causes shall be stayed pending final resolution of their settlements with the class.

* * *

DONE this 28th day of May, 1980, in Houston, Texas.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

NO. 79-972

IN THE

Supreme Court of the United States

October Term, 1979

WESTVACO CORPORATION,
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ADAMS EXTRACT COMPANY, ET AL,
Respondents

**On Writ of Certiorari to the
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BRIEF FOR PETITIONER PACKAGING CORPORATION OF AMERICA

QUESTION PRESENTED

Whether a defendant in an antitrust case may assert a right of contribution with respect to another alleged violator by cross-claim, impleader, or a separate action or, in the event such violator has settled, by claim reduction?

LIST OF ALL PARTIES TO THE PROCEEDING

LIST OF RESPONDENTS

A. Plaintiffs-Respondents:

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberley Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.
Bateman Canning Co.
The Beaumont Co.
Bert Paley, Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company, Inc.
Denver Meat Co.
District Hotel Supply, Inc.
Doranne of California d/b/a Embassy Giftwares
Douglas Furniture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.
Dulaney Foods, Inc.
Erie Seating Co.

Plaintiffs-Respondents

Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furniture Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.
I. Kaplan, Inc.
Ilikon Corporation
International Frozen Foods, Inc.
Iowa Beef Processors, Inc.
ITT Continental Baking Co.
ITT Gwaltney, Inc.
Jefferson Orchards, Inc.
John Inglis Frozen Foods Co.
Keller Street Development Co.
Land O'Lakes, Inc.
Levee Furniture Co.
Liberty Dairy Company
Macomb Pottery Co., Inc.
Maier Brewing Co.
Marathon Enterprises, Inc.
Metro Molding Corporation
Mid-Valley Packing Co., Inc.
Mister B. Greeting Card Co., Inc.
Narragansett Brewing Company
Northland Aluminum Products, Inc.
Nutritional Food Products, Inc.
The Paniplus Co.
Pearl Brewing Company
Pearson Candy Co.
Penthouse Furniture Ltd.

Plaintiffs-Respondents:

The Pillsbury Co.
Poppin Fresh Pies, Inc.
Red Wing Industries, Inc.
Renown, Inc.
Rollins Container, Inc.
Rossville Packing Co., Inc.
S & P Company
Salsbury Meats, Inc.
Sambo's Restaurants, Inc.
Seneca Industries, Inc.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.
Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furniture Ltd.
Trappe Frozen Foods Corp.
United Farmers Cooperative, Inc.
United Food Services, Inc.
United Foods, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales, Inc.
Valley Farms, Inc.
Valley Plastics, Inc.
Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Golf Supply Co., Inc.

B. Defendants-Respondents:

Boise Cascade Corporation
Champion International, Inc.

Defendants-Respondents:

The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Corco, Inc.
Diamond International Corporation
Dura-Containers, Inc.
Green Bay Packaging, Inc.
Hoerner Waldorf Corporation
Inland Container Corporation
International Paper Company
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
Menasha Corporation
Olinkraft, Inc.
Owens-Illinois, Inc.
St. Joe Paper Company
St. Regis Paper Company
Stone Container Corporation
Union Camp Corporation
U. S. Corrugated Fibre-Box Company
Western Kraft East, Inc.
Weyerhaeuser Company
Williamette Industries

C. Co-Petitioners:

Westvaco Corporation
Georgia-Pacific Corporation

D. The Solicitor General of the United States

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